

CASE NOS. 18-1909, 18-1988

**In the
United States Court of Appeals
for the Sixth Circuit**

LOU'S TRANSPORT, INC. AND T.K.M.S., INC.

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner

REPLY BRIEF OF PETITIONERS CROSS-RESPONDENTS

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

	Page
I. INTRODUCTION	2
II. THE BOARD AND THE ALJ ABUSED THEIR DISCRETION IN CALCULATING BACK PAY AND ALLOWING INTERIM MILEAGE EXPENSES	2
III. THE BOARD’S ORDER VIOLATES PETITIONERS’ CONSTITUTIONAL RIGHTS	4
IV. CONCLUSION AND RELIEF REQUESTED	5
CERTIFICATE OF COMPLIANCE	7
CERTIFICATE OF SERVICE	8-9
DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS	10

I. INTRODUCTION

The Board's Decision and Order was erroneous because (1) the Board and the ALJ abused their discretion in making their back pay calculations and allowing mileage expenses, and (2) it violates Petitioners' constitutional rights. Because the Board's Decision and Order is erroneous, this Honorable Court should vacate the Order.

II. THE BOARD AND THE ALJ ABUSED THEIR DISCRETION IN CALCULATING BACK PAY AND ALLOWING INTERIM MILEAGE EXPENSES.

In its appellate brief, the Board made repeated references to its "broad remedial discretion," and it used this standard to justify every decision made by the Board and ALJ in calculating back pay and awarding mileage expenses, regardless of what the facts, law, and equity otherwise supported. The Board's application of this standard equated to the Board and ALJ having carte blanche to use whatever methodologies, comparables, and pay rates they wanted to use in calculating back pay, and to completely disregard the facts presented by Petitioners in awarding mileage expenses. However, doing so is fundamentally unfair and runs contrary to the stated purpose of back pay, that being to put the complainant in the same financial position he would have been but for his termination – the parties agree on this stated purpose. Back pay is not a punitive remedy.

Nothing the Board cited in its brief justifies its use of erroneous and unfair procedures in this case. The purpose of back pay is to restore the complainant financially to where he would have been but for the termination. As such, back pay is not warranted in a situation where claimant Hershey earned more money at his interim employment than he would have earned if he stayed at Lou's, and he did so working fewer hours.

The Board rationalized using an average of Hershey's interim hourly wage rather than his actual interim wage under its "broad remedial discretion." In fact, the Board had no reason to use Hershey's average interim hourly wage when it had his actual wage available except that using an average was more beneficial to Hershey. It appears that under the guise of its "broad remedial discretion," the Board made certain calculations in order to create a higher backpay number for Hershey and punish Lou's. No Board decision or case law permits the Board to abuse its "broad remedial discretion" to manipulate calculations in order to achieve a higher number for an employee and punish the employer.

The Board also abused its discretion by applying mixed methodologies for calculating regular time versus overtime pay. When the Board allocated overtime for a two week pay period for the comparables, it merely took the total overtime hours, divided by two, and allocated equal amounts of overtime hours to each week of the payroll period. Petitioners' appellate brief explains in detail why this

method was unfair and how it created a “win-win” for Hershey and punished Lou’s. But the Board’s appellate brief mistakenly assumed that it was Petitioners’ burden to teach the Board how to properly calculate and allocate overtime. In fact, the Board has the obligation to use the evidence before it and available to it to reach the most accurate calculations. The Board did not properly allocate overtime when it initially calculated back pay, but instead purposely limited its scope of requested payroll records. As a result, it used an average rather than actual calculations. So even though the Board requested the payroll records of the comparable employees, it avoided documentation that would have led to the appropriate allocation of overtime hours. Instead, the Board requested only that information which would make its calculations one-sided – the Board opted to make general or average calculations, knowing that doing so would benefit Hershey. The Board’s estimates or averages are simply unreasonable.

III. THE BOARD’S ORDER VIOLATES PETITIONERS’ CONSTITUTIONAL RIGHTS

Petitioners’ constitutional challenges were adequately briefed and were not waived. The use of the ALJ deprived Petitioners of an Article III judge or jury. Petitioners previously made their Article III argument in their Exceptions to the ALJ’s Supplemental Decision (App. 37). Unfortunately, the Board failed to address this issue in its July 24, 2018 Supplemental Decision and Order. (App. 716.)

Further, Petitioners did not waive their due process and equal protection challenges. These are not new arguments on appeal, as the Board claims. Petitioners have repeatedly raised arguments regarding the Board's continued delays in amending its compliance specification (and issues related thereto) and the Board's mixed methodologies in calculating back pay. Petitioners have consistently challenged these violations since at least November 2017, following the hearing in front of the ALJ and included in Petitioners' post hearing brief. These claims and were reiterated by Petitioners in their Exceptions to the ALJ's Supplemental Decision (App. 37). Petitioners then presented their claims before this Court. Petitioners' constitutional challenges are in no way new to the Board, and it is disingenuous of the Board to claim otherwise.

IV. CONCLUSION AND RELIEF REQUESTED

The purpose and intent of a back pay award is to make the employee whole. The Board and the ALJ, however, have ignored that purpose and intent, and instead, have manipulated the numbers, considerations, and methodologies used in its seven (7) compliance specifications to come up with some kind of award to justify the Board's use of two years' worth of taxpayer money to pursue a claim on behalf of someone who earned more money during his interim employment while working fewer hours.

Wherefore, for the reasons stated above, Petitioners Lou's Transport, Inc. and T.K.M.S., Inc. respectfully request that this Honorable Court:

- A. Vacate the July 24, 2018 Supplemental Decision and Order of the Board;
- B. Enter an Order declaring that Hershey is not entitled to any award of back pay, bonuses, interim expenses or 401(k) distribution.

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Dated: January 9, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 963 words and this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type of style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system that being:

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I am competent and able to testify to the statements contained herein if called upon to do so in a court of law.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Description of Entry	Date Filed	Appendix Page Number
Respondents Exceptions to ALJ's Supplemental Decision	February 19, 2018	37
Supplemental Decision and Order	July 24, 2018	716